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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 124

NATIONAL LEAD COMPANY, *Petitioner,*

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The findings of fact and opinion of the Tax Court (R. 3-55) are reported at 23 T.C. 988, 1002. The opinion of the Court of Appeals for the Second Circuit (R. 57-62) is reported at 230 F. (2d) 161.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit, reversing the Tax Court, was entered February 14, 1956 (R. 63). The taxpayer's timely petition for rehearing, filed February 29, 1956, was denied by Order entered March 12, 1956 (R. 63, 64). The petition for a writ of certiorari was filed on May 29, 1956, and was granted on June 11, 1956. U.S. , 100 L. Ed. (Advance p. 879). The jurisdiction of this Court rests on Title 28, U.S.C., Sec. 1254(1).

STATUTES AND REGULATIONS INVOLVED

The statutory provisions involved are sections 23(t), 124(a), 124(e)(1), and 124(f)(1) of the Internal Revenue Code of 1939, and the Regulations involved are Treasury Regulations 111, Section 29.124-6, all of which are set forth in the Appendix, pp. 1a-4a, *infra*.

QUESTIONS PRESENTED

1. Whether in proceedings upon a petition to the Tax Court under section 272 of the Internal Revenue Code of 1939, for a redetermination of a deficiency of tax asserted by the Commissioner and the finding of an overpayment of tax as provided in section 322(d) of the Code, the taxpayer may challenge the Commissioner's computation of the adjusted basis of an emergency facility for the purpose of amortization deductions under sections 23(t) and 124 of the Code, wherein the Commissioner gave effect to the action of the War Production Board in purporting to limit the applicability of the certificate of necessity issued by it under section 124 with respect to the acquisition, etc., of such facility, to only such part of the cost thereof as it deemed to represent the excess of the facility's

war-time cost over its estimated peace-time cost, on the ground that it considered such facility to have post-war use.

2. Whether in such proceedings the taxpayer may properly challenge the authority of the War Production Board under section 124 of the Internal Revenue Code of 1939, to limit, for the purpose of determining the adjusted basis of an emergency facility for use in computing the allowable amortization deduction under sections 23(t) and 124 of the Code, the applicability of the certificate of necessity issued by it under section 124 of the Code with respect to the acquisition, etc., of such facility, to only such part of the cost thereof as it deemed to represent the excess of the facility's war-time cost over its estimated peace-time cost on the ground that it considered such facility as likely to have post-war use.

3. Whether the War Production Board had authority under section 124 of the Internal Revenue Code of 1939 so to limit the applicability of a certificate of necessity issued by it thereunder.

4. Whether, if the War Production Board had no such authority so to limit a certificate of necessity issued under section 124 of the Internal Revenue Code of 1939, the holder of a certificate in terms so limited may amortize during the accelerated statutory period the full cost of the emergency facility in respect of the aequisition, etc., of which the certificate was issued.

5. Whether the Court of Appeals for the Second Circuit erred in disregarding findings of fact by the Tax Court supported by the evidence, and substituting its own findings.

6. Whether the Court of Appeals for the Second Circuit erred in passing upon and in deciding the case on an issue not raised in the Tax Court by the pleadings or otherwise, and which was not considered or passed upon by the Tax Court.

7. Whether, on its theory of the case, the Court of Appeals for the Second Circuit erred in failing to remand the case to the Tax Court for further proceedings.

STATEMENT

The controversy stems from World War II legislation enacted to encourage industrial expansion urgent to the war effort by permitting accelerated amortization deductions, for tax purposes, with respect to new and expanded facilities certified as necessary to the national defense. In the period here pertinent the War Production Board (the "Board") was the certifying agency.

In the proceedings before the Tax Court, the facts were fully stipulated by the parties and the stipulated facts were adopted by the Tax Court as its findings of fact (23 T.C. 988, 989; R. 3-53). The facts, so stipulated and found, may be summarized as follows:

During World War II the petitioner (the "taxpayer") was engaged in the manufacture of engine bearings. Requiring additional facilities for such purpose, the taxpayer applied to the Board for certificates under section 124(f) of the Internal Revenue Code of 1939 that the acquisition, etc., of such facilities was "necessary in the interest of national defense during the emergency period". Such certificates would, under sections 23(t) and 124(a) of the Code, permit the taxpayer, in computing taxable income, to

elect to take amortization deductions spread over a five-year, or shorter period, rather than the ordinary depreciation deductions spread over the normal useful lives of the facilities.

The Board issued four such certificates in respect of the acquisition, etc., of such facilities (R. 5, 6, 8A, 8B). The Board, however, had, late in 1943, adopted a policy designed to limit amortization to the excess of war-time costs over estimated peace-time costs in the case of certified facilities likely to have post-war utility (R. 9-52). Pursuant to that policy, the certificates were framed as follows (R. 8A, 8B):

> It is hereby certified that the facilities * * * are necessary in the interest of national defense during the emergency period, up to 35 per cent of the cost attributable to the construction * * * or acquisition thereof * * *.

In one instance, the percentage was 50 per cent.

When the taxpayer filed its tax returns, it elected to take the amortization deductions. In computing its amortization deductions, the taxpayer gave effect to the percentage of cost limitations contained in the certificates.

Subsequently, the Commissioner asserted deficiencies against the taxpayer on grounds unrelated to the amortization issue here presented, whereupon the taxpayer duly filed its petition to the Tax Court. By amended petition, timely filed, the taxpayer claimed that it had taken amortization deductions only to the percentages of the costs of the certified facilities that were specified by the Board in the certificates, whereas it should have been allowed amortization deductions based upon their full costs (R. 1, 2). The parties

stipulated the exact amount to be amortized in the case of each of the certified facilities "if no such percentage limitation is applicable" (R. 6, 7). The only issue before the Tax Court was whether the Board had authority under section 124 of the Code so to limit certificates of necessity issued thereunder, and the only question passed upon by the Tax Court was the proper construction to be given the pertinent provisions of that section (R. 53-55).

The Tax Court, one judge dissenting, sustained the taxpayer's contention that the Board had no such authority, and in holding that the taxpayer could amortize its full costs, expressed agreement with the majority views of the Court of Claims in *Wickes Corp.* v. *U.S.*, 108 F. Supp. 616 (1952), which that Court has since reiterated in *Ohio Power Co.* v. *U.S.*, 129 F. Supp. 215 (1955), cert. denied 350 U.S. 862 (1955), reh. denied 350 U.S. 919 (1955),[1] and *Allen-Bradley Co.* v. *U.S.*, F. Supp. (1956), cert. granted U.S. , 24 L.W. 3336, and with the dissenting opinion of Judge Miller of the Court of Appeals for the District of Columbia in *United States Graphite Co.* v. *Sawyer*, 176 F. (2d) 868 (1949). The Court of Appeals for the Second Circuit reversed.

The ultimate questions common to this and the *Ohio Power* and *Allen-Bradley* cases are whether the Board's action in limiting its certificates because of probable post-war use was within its authority under section 124(f)(1) properly construed, and, if not, whether a holder of a certificate purporting to be

[1] Motion for leave to file a further petition for rehearing denied U.S. , 24 L.W. 3320, order denying rehearing vacated and petition for rehearing continued U.S. , 24 L.W. 3337.

limited to less than 100 per cent of cost is entitled to amortize the full cost of the property during the accelerated statutory period.

While the Court below said that it did not reach the first of these questions, it in fact proceeded, 230 F. (2d) at 164 (R. 57-62), to analyze the statute and to reach the conclusion that the Board had discretion under the statute to issue certificates with respect to less than 100 per cent of cost. The Court expressed disagreement with the reasoning in *Wickes Corp.* v. *U.S., supra,* and interpreted the certificates as certifying the facilities as being only partially necessary to the national defense—i.e., only to the extent of the specified percentages of their costs—thus completely ignoring the finding of the Tax Court, adopting the stipulation of facts between the parties which the Commissioner summarized in his main brief below, p. 4, as follows:

> All these partial certifications were issued pursuant to the then policy of the War Production Board of * * * certifying only that portion of the cost representing excess war costs where the facility had clear post-war use.[2]

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[2] In its main brief below (p. 1), the taxpayer stated that it took "no issue" with the Commissioner's statement of the case. Copies of the briefs below were lodged with the Clerk simultaneously with the filing of the petition for certiorari. In its reply brief in support of its motion for leave to file a petition for rehearing in *Ohio Power,* No. 312, October Term, 1955, the Government said (p. 3):

> * * * in *National Lead,* both the Government and the taxpayer presented the case to the Court of Appeals as one where the certificates were issued for less than 100 per cent of cost only because of the policy of the administrative agency to reflect post-war use.

See also quotation from p. 18, Commissioner's brief below, set out at p. 25, *infra.*

The Court below answered the second question by holding that the Board's authority to issue a limited certificate could not be challenged in this proceeding, and that the taxpayer's only remedy was mandamus against the Board. For the proposition that such relief was available, the Court cited *United States Graphite Co.* v. *Harriman*, 71 F. Supp. 944 (D.C.D.C., 1947), aff'd, *sub. nom. United States Graphite Co.* v. *Sawyer*, 176 F. (2d) 868 (C.A.D.C., 1949), cert. denied, 339 U.S. 904 (1949). The Court below held that by its failure to pursue such remedy at the time of the issuance of the certificates and by its "acceptance" thereof, the taxpayer had "forfeited" its right to challenge the Board's action. 230 F. (2d) at 165 (R. 61, 62).

Whether the authority of the Board to issue a limited certificate "to reflect post-war use" or the propriety of the Commissioner's giving effect to such limitation in his computations could be challenged in this proceeding was not raised by the Commissioner in his answer (R. 3) or otherwise in the Tax Court notwithstanding the provision of Rule 14 of the Tax Court's Rules of Practice that

> the answer shall be so drawn as fully and completely to advise the petitioner and the Court of the nature of the defense.

The taxpayer's right to challenge, in this proceeding, the Board's authority under section 124 so to limit a certificate of necessity issued thereunder was questioned for the first time in the Commissioner's main brief, pp. 41-47, in the Court of Appeals. Upon its petition for rehearing in the Court below, the taxpayer pointed this out, and urged that if the Court should nevertheless adhere to its decision to reverse,

it should nevertheless remand the case to the Tax Court, to afford the taxpayer an opportunity to improve the record on this score, if it could. *Hormel* v. *Helvering*, 312 U.S. 552 (1941). The Court below declined to do so.

SUMMARY OF ARGUMENT

I.

The controversy arises as the result of a determination made by the Commissioner of Internal Revenue under section 124 of the Internal Revenue Code of 1939, and is properly to be resolved upon petition to the Tax Court. That the question involved is the effect to be given by the Commissioner to certificates of necessity issued by the War Production Board under section 124 of the Internal Revenue Code, does not render inapplicable the ordinary procedures provided by the Congress for the resolution of tax controversies. Extraordinary remedies are not usually available when the ordinary remedies are adequate, and when specific remedies are provided other remedies are presumptively excluded. In tax controversies especially, the taxpayer is confined to the remedies specifically provided by the Congress, except in the most unusual of circumstances. Mandamus against the Board would have been wholly inconclusive and inadequate as a remedy.

II.

Waiver, estoppel and collateral attack are affirmative defenses necessary to be pleaded. They were neither pleaded, briefed nor argued by the Commissioner in the Tax Court, and were raised by him for the first time in the Court of Appeals. Accordingly,

these defenses should not have been considered by the Court of Appeals.

III.

Section 124 did not, in terms, authorize the Board or the Commissioner to limit the amount amortizable thereunder with respect to a certified facility to the excess of its war-time cost over its estimated peace-time cost, on the ground that the facility was likely to have post-war utility. The legislative history of section 124 makes it clear that Congress did not intend that any such authority should be vested in either the Board or the Commissioner. On the contrary, it affirmatively appears from the legislative history that section 124 was intended to predetermine the amount amortizable with respect to a facility certified thereunder and to leave no authority or discretion in the Board or the Commissioner to vary the amount so predetermined. The legislative history further shows affirmatively that the language of subsection (f)(1) of section 124, relied on by the Commissioner, was included only for the purpose of authorizing the amortization of post-critical-date costs of the construction or acquisition of a certified facility where its construction or acquisition began before the critical date specified in section 124.

The only authority of the Board under section 124 was to certify, or to refuse to certify, a facility as being "necessary in the interest of national defense", and with respect to a facility so certified section 124 itself determined the amount that could be amortized. Accordingly, any policy or regulation of the Board purporting to limit the amount that could be amortized to less than that predetermined by the statute, and

any such purported limitation on the amortizable amount inserted in a certificate of necessity pursuant thereto, was void as being beyond the authority of the Board. Such a void limitation is ineffective, and binds neither the Commissioner nor the taxpayer.

IV.

The parties stipulated, the Tax Court found, and the case was presented to the Court of Appeals as one where the certificates were issued for less than 100% only because of the policy of the Board to limit amortization to excess war costs where the certified facility was likely to have post-war use. It was error for the Court of Appeals to disregard such stipulation and finding, confirmed by the position taken by both parties before it, and to find, as it did, that the Board "never determined that the facilities in question were necessary to the national defense in their entirety". The finding of fact of the Tax Court was supported by the evidence and as such was conclusive. The Court of Appeals was without power to make any findings of fact.

On its own theory of the case, the Court of Appeals erred in not remanding the cause to the Tax Court to afford the taxpayer an opportunity to improve the record, if it could. Thus, if a judgment in mandamus is a prerequisite to relief the taxpayer seeks, the taxpayer should have been given an opportunity to seek such a judgment against the Secretary of Commerce, the Board's successor. Similarly, if the defenses of waiver, estoppel and collateral attack, which were not pleaded, briefed or argued in the Tax Court nor passed upon by it, were nevertheless properly in the case, the taxpayer should have been given an opportunity to

introduce into the record relevant evidence with respect thereto, of which the record before the Court of Appeals was necessarily barren.

V.

The only questions involved are questions of law, and this Court should reverse the judgment of the Court of Appeals and reinstate the determination of the Tax Court, unless, of course, this Court should accept the theory of the Court below, in which event the case should be remanded to the Tax Court for further proceedings in order to afford the taxpayer an opportunity to improve the record.

ARGUMENT

POINT I

A CERTIFICATE OF NECESSITY ISSUED UNDER SECTION 124 OF THE INTERNAL REVENUE CODE OF 1939 IS AN INSTRUMENT OF TAXATION. ITS SOLE LEGAL EFFECT IS TO CONTROL THE AMOUNT OF A TAX DEDUCTION. A PETITION TO THE TAX COURT FOR A REDETERMINATION OF A TAX DEFICIENCY IS THE MEANS PROVIDED BY LAW FOR THE RESOLUTION OF TAX CONTROVERSIES BETWEEN THE COMMISSIONER AND A TAXPAYER. IN SUCH A PROCEEDING A TAXPAYER MAY PROPERLY CHALLENGE BOTH THE EFFECT GIVEN BY THE COMMISSIONER TO A CERTIFICATE OF NECESSITY AND THE AUTHORITY OF THE CERTIFYING AGENCY TO ATTACH TO A CERTIFICATE CONSEQUENCES LESS ADVANTAGEOUS TO THE TAXPAYER THAN THOSE WHICH THE STATUTE PRESCRIBES.

A. The Commissioner determines the effect to be given a certificate of necessity under section 124 of the Internal Revenue Code of 1939. Such a determination is reviewable in Tax Court proceedings, in the usual way.

Section 124 is an integral part of the Internal Revenue Code and its sole impact is on taxation. While the Commissioner was not the certifying agency, the certificates were addressed to him (R. 5, 6, 8A, 8B), and the consequences of certification are necessarily for him to determine. His determinations,

generally, are subject to redetermination and review, upon proceedings initiated by petition to the Tax Court as provided in section 272 of the Code, or by action for refund in the Court of Claims or a District Court. *Lowe Brothers Co.* v. *United States*, 304 U.S. 302 (1938); Title 28, U.S.C., Sec. 1346. His determinations under section 124 are no exception.

Thus, in *American Twist Drill Company* v. *Commissioner*, 11 T.C. 200 (1948), the certifying agency, acting under section 124, duly issued a certificate of necessity covering the taxpayer's facilities. Nevertheless, the Commissioner refused to give effect to the certificate, holding that under a proper interpretation of the statutory language, i.e., subsection (f)(3) of section 124, construction of the taxpayer's facility had been begun more than six months before it filed its application for a certificate. The Tax Court approved the Commissioner's interpretation. The facts of the case were clear enough; whether the taxpayer's application was timely depended not on the fact-finding process, but on statutory interpretation. In this respect, the certifying agency adopted one view of the law;[3] the Commissioner and the Tax Court adopted another.

In *Arkansas-Oklahoma Gas Co.* v. *Commissioner*, 17 T.C. 1208 (1952), the certifying agency had issued certificates covering certain gas wells, an action which

[3] This is not a matter of record, but must perforce be assumed, for purposeful issuance of an ineffective certificate is not to be presumed. Cf. *Douglas* v. *Noble*, 261 U.S. 165 (1923), at p. 170; *Utah Power & Light Co.* v. *Pfost*, 286 U.S. 165 (1932), at p. 190. Certainly the certifying agencies did not deliberately overlook time limits for filing applications. See *Gray* v. *Commissioner*, 16 T.C. 262 (1951).

would have been appropriate and effective only if the statutory definition of the term "emergency facility" contained in subsection (e) of section 124 embraced a gas well. Again, the Commissioner disagreed with the position of the certifying agency, and the Tax Court upheld the Commissioner, holding that the statutory term "facility" could not embrace a gas well. The Court of Appeals for the Eighth Circuit reversed the Tax Court, 201 F. (2d) 98 (1953).

What is involved at bar is the construction, the interpretation, of section 124(f)(1). Can there be any valid reason why the construction adopted by the Commissioner should not be subject to challenge by the taxpayer in this Tax Court proceeding, just as in *American Twist Drill* and *Arkansas-Oklahoma Gas* the taxpayer challenged the Commissioner's interpretations of sections 124(f)(3) and 124(e), respectively? The only difference is that here the Commissioner happens to be in agreement with the construction adopted by the certifying agency, whereas in the cases cited he was not. But even such unanimity among Government agencies affords no basis for contending, much less holding, as did the Court below, that the correctness of their construction is beyond challenge by the taxpayer in the ordinary manner provided by law for the resolution of tax disputes. Cf. *Medbury* v. *United States*, 173 U.S. 492 (1899), esp. pp. 497, 498.

B. Congress has specified remedies which may be pursued by taxpayers who find themselves in controversy with the Commissioner of Internal Revenue. Normally, and especially in tax matters, the specification of a particular remedy or remedies excludes other alternatives. When ordinary remedies are available, extraordinary ones usually are not.

For those who regard themselves aggrieved by actions of the Commissioner of Internal Revenue in respect of their income tax liabilities, Congress has provided two paths of access to the judiciary. One path leads to the Tax Court; the other to the District Courts and the Court of Claims. Broadly speaking, the first permits resolution of the controversy without payment of the tax until the Tax Court, at least, has spoken; the Commissioner asserts a tax deficiency, the taxpayer invokes the jurisdiction of the Tax Court, and the Tax Court then determines the correct liability. The second path may be taken only by those who pay the claimed tax first; they then sue for the return, or refund, of what they claim to have overpaid. Any taxpayer may make his choice of paths to reach his day in court; none may have two days by following both.

When the Commissioner asserted a tax deficiency against the taxpayer here, it chose the Tax Court path. It invoked the jurisdiction conferred and the procedures prescribed by sections 272 and 322(d) of the Internal Revenue Code of 1939.

Section 272 provides, in pertinent part:

> (a) If in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of * * * tax * * * , the Commissioner is authorized to send notice of such deficiency to the taxpayer by * * * mail. Within ninety days * * * the taxpayer may file a petition with the

> Tax Court * * * for a redetermination of the deficiency. * * *
>
> * * *
>
> (e) The Tax Court shall have jurisdiction to redetermine the correct amount of the deficiency even if the amount so redetermined is greater than the amount of the deficiency, notice of which has been mailed to the taxpayer * * *.
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> * * *

Section 322(d) provides, in pertinent part:

> If the Tax Court finds that there is no deficiency and further finds that the taxpayer has made an overpayment of tax in respect of the taxable year in respect of which the Commissioner determined the deficiency, or finds that there is a deficiency but that the taxpayer has made an overpayment of tax in respect of such taxable year, the Tax Court shall have jurisdiction to determine the amount of such overpayment, and such amount shall, when the decision of the Tax Court has become final, be credited or refunded to the taxpayer. * * *

Notwithstanding this clear and all-inclusive statutory language, and notwithstanding that Congress made no special provision for direct review of the action of certifying agencies, the Court below holds that the ordinary remedies are not available to a taxpayer when the controversy has its root in the effect to be given a certificate of necessity issued under section 124 and is dependent upon the construction to be given section 124(f)(1). Thus, the Court below said, 230 F. (2d) at 165 (R. 61, 62):

> The proper way in which to challenge the Board's alleged error was to attack it directly by mandamus in the District of Columbia. The courts of the District have entertained mandamus proceedings for that purpose, *United States Graphite Co.*

> v. *Harriman*, * * * 71 F. Supp. 944, aff'd *per curiam, sub nom., United States Graphite Co.* v. *Sawyer*, * * * 176 F. 2d 868, cert. denied, 339 U.S. 904, * * * and the remedy was altogether appropriate.[4]

But the statutory review provisions apply to *all* tax controversies and make no exception for adjustments resulting from construction, or misconstruction, of section 124. Indeed, as this Court said in *Switchmen's Union* v. *National Mediation Board*, 320 U.S. 297 (1943), 301:

> All constitutional questions aside, it is for Congress to determine how the rights which it creates shall be enforced * * *. In such a case the specification of one remedy normally excludes another.

This is especially so in matters involving taxation, and, except only in the most unusual circumstances, this Court has consistently refused to permit the pursuit of unspecified remedies in tax controversies. *Allen* v. *Regents of the University System of Georgia*, 304 U.S. 439 (1938); *United States ex rel. Girard Trust Co.* v. *Helvering*, 301 U.S. 540 (1937); *Graham* v. *Dupont*, 262 U.S. 234 (1923); *Miller* v. *Standard Nut Margarine Co.*, 284 U.S. 498 (1932); *Cheatham* v.

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[4] In the next sentence the Court below added an application for "appropriate injunctive relief" to mandamus as "the" remedy which the taxpayer might have, nay, alone could have pursued. But the principles applicable in the circumstances to injunctive relief are not different from those governing mandamus. Cf. *Adams* v. *Nagle*, 303 U.S. 532 (1938), esp. p. 542; *Red Canyon Sheep Co.* v. *Ickes*, 98 F. (2d) 308 (C.A. D.C., 1938), esp. p. 322. Accordingly, the two "remedies" prescribed by the Court below may properly be considered as one and the same, and are herein so treated.

Norvekl, 92 U.S. 85 (1876); *Nicholl* v. *U.S.*, 74 U.S. 122 (1869). Thus, in *Cheatham* v. *Norvekl* this Court said, 92 U.S. at p. 88:

> The revenue measures * * * constitute a system which provides for its enforcement by officers commissioned for that purpose. * * * this system * * * provides safeguards of its own against mistake, injustice or oppression, in * * * administration * * *. Such appeals are allowed to specified tribunals as the lawmakers deem expedient. Such remedies, also, for recovering back taxes illegally exacted, as may seem wise, are provided. In these respects, the United States has * * * enacted a system of corrective justice, as well as a system of taxation * * *. That system is intended to be complete.

Section 124 is part and parcel of the Internal Revenue Code, and the system now in effect specifically provides for the resolution of tax controversies through redetermination proceedings on petition to the Tax Court and subsequent judicial review, or by action for refund in the Court of Claims or a District Court. Congress has specified no other remedies as being applicable to section 124, and in the presence of these familiar and accustomed means of securing a review of the Commissioner's determinations, there is a curious inversion inherent in the holding that the availability of the *extraordinary* remedy of mandamus against the Board renders unavailable the *ordinary* remedies prescribed by the Code for the review and correction of the Commissioner's determinations. For, mandamus is "usually denied where other adequate remedy is available". *Ex parte Republic of Peru*, 318 U.S. 578 (1943); *United States ex rel. Girard Trust Co.* v. *Helvering*, 301 U.S. 540 (1937); *Ex parte*

Baldwin, 291 U.S. 610 (1934); *United States* v. *Duell*, 172 U.S. 576 (1899); *Reeside* v. *Walker*, 11 How. (52 U.S.) 272 (1850).

Moreover, the Court below was manifestly in error in holding that mandamus against the Board was available as a remedy. This Court has repeatedly said, as it did in *Wilbur* v. *United States ex rel. Kadrie*, 281 U.S. 206 (1930):

> Where the duty in a particular situation is so plainly prescribed as to be free from doubt and equivalent to a positive command it is regarded as being so far ministerial that its performance may be compelled by mandamus * * *. But where the duty is not thus plainly prescribed but depends upon a statute * * * the construction or application of which is not free from doubt, it is regarded as involving the character of judgment or discretion which cannot be controlled by mandamus. (pp. 218-219)

And, while in such a case, as this Court said in *Adams* v. *Nagle*, 303 U.S. 532 (1938), the administrative officer's

> errors may be subject to subsequent correction, they cannot be enjoined * * *. To hold otherwise would render orderly administrative procedure impossible. (p. 543)

The only means of "subsequent correction" here available were the ordinary remedies of a taxpayer against the Commissioner, which include a petition to the Tax Court.

Nor in *United States Graphite Co.* v. *Harriman*, 71 F. Supp. 944, relied on by the Court below, did the District Court for the District of Columbia (or the

Court of Appeals which affirmed *per curiam* on Judge Pine's opinion) misunderstand, as did the Court below, the limited nature of its jurisdiction on mandamus. For, in denying mandamus, Judge Pine said, 71 F. Supp. at 946:

> * * * but in any event, defendant's construction being reasonable, it cannot be set aside by the courts in this proceeding.
>
> * * *
>
> * * *Thus there is no showing that the exercise of this discretion comes within the exception permitting courts to intervene. *So far as its exercise involves interpretation of the statute* * * *, *the statement made in the preceding paragraph is equally applicable* * * *. (Emphasis supplied.)

Heading the list of the many cases in this Court and the Court of Appeals for the District of Columbia cited by Judge Pine in support of the foregoing are *Adams* v. *Nagle* and *Wilbur* v. *United States ex rel. Kadrie, supra.* And while Judge Pine and the majority of the Court of Appeals may have agreed with the Board's construction of the statute, it is clear that mandamus would equally have been refused if they had disagreed with the Board's interpretation, provided only they found it "reasonably possible". For, if the law be otherwise elsewhere, the Court of Appeals for the District of Columbia has frequently said, as it did in *Red Canyon Sheep Co.* v. *Ickes,* 98 F. (2d) 308 (C.A.D.C., 1938), one of the many authorities to the same effect cited by Judge Pine:

> * * * The rule is, of course, too well settled to require discussion that mandamus will not issue to interfere with the discretion of an administrative officer in construing a statute *even though the court would construe the statute otherwise, pro-*

vided the officer's construction is reasonably possible. (p. 322) (Emphasis supplied.)

Thus, all the *United States Graphite* case stands for is that the Board's construction was not necessarily unreasonable so as to permit judicial interference *in limine* by mandamus. But, the refusal of mandamus does not preclude "subsequent correction". *Adams* v. *Nagle, loc. cit. supra.* The Government itself recognized this when, after the decision in the *United States Graphite* case, the plaintiff, by then merged into the Wickes Corp. under that name, brought an action in the Court of Claims for tax refund, and made the same contention, with success, that it had made without success upon its application for mandamus. *Wickes Corp.* v. *United States,* 108 F. Supp. 616. In the latter case the Government, quite properly, did not plead *rēs adjudicata,* for the only question in the *United States Graphite* case was whether the Board's construction was "reasonably possible", while the issue in the *Wickes* case was whether it was correct. So long as it stands unreversed, the opinion below will lend authority to a heresy which, as this Court has said, "would render orderly administrative procedure impossible". *Adams* v. *Nagle, loc. cit. supra.*[5]

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[5] In the case cited, this Court struck down as erroneous the view taken by a "number of Federal courts" on the basis of broad language used in *United States* v. *Knox,* 102 U.S. 425 (1880), that the remedy for "clear error of law" on the part of a public officer was by direct attack for mandamus or injunctive relief. See *Adams* v. *Nagle,* 303 U.S. 532 (1938), at pp. 541, 542. Moreover, it should be noted that the certificates here involved were applied for and issued between February and November, 1944. Accordingly, even if the Administrative Procedure Act, Title 5, U.S.C., Sec. 1001 *et seq.*, broadened the scope of re-

In *United States* v. *Hitchcock*, 190 U.S. 316 (1903), this Court, in upholding the Court below in refusing to issue a writ of mandamus to the Secretary of the Interior, said:

> Whether he decided right or wrong, is not the question. Having jurisdiction to decide at all, he had necessarily jurisdiction, and it was his duty to decide as he thought the law was, and the courts have no power whatever under those circumstances to review his determination by mandamus or injunction. * * * The writ never can be used as a substitute for a writ of error. (pp. 324, 325)

Nor, we submit, could it serve as a substitute for the remedies specifically provided by Congress for disputes arising under the Internal Revenue Code. It is therefore submitted that petition to the Tax Court was an appropriate remedy for the taxpayer to pursue to challenge the effect given by the Commissioner to the Board's limited certificates and the Board's authority so to limit its certificates under section 124 of the Internal Revenue Code of 1939.

POINT II

IN ANY EVENT, IN THE POSTURE OF THE CASE AS IT REACHED THE COURT BELOW, WHETHER THE FAILURE OF THE TAXPAYER TO PURSUE SOME OTHER REMEDY AGAINST THE BOARD PRECLUDED ITS PURSUIT OF THIS REMEDY AGAINST THE COMMISSIONER WAS NOT PROPERLY BEFORE THAT COURT AND IT "SHOULD HAVE PASSED THE POINT". THE CONTROVERSY SHOULD BE DECIDED ON THE MERITS.

The decision of the Court below is, in effect, that the taxpayer's proper remedy was a direct attack by mandamus against the Board, that this proceeding constitutes a forbidden collateral attack on the Board's

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view on mandamus or injunction, such remedies were not available to the taxpayer, as the Administrative Procedure Act was not enacted until 1946.

action, and, further, that by reason of its "acceptance" of the certificates and failure to make a direct attack, the taxpayer was estopped, or had waived its right to challenge the Board's authority to issue limited certificates. But neither waiver, estoppel nor collateral attack was pleaded, briefed or argued by the Commissioner in the Tax Court, and no such issue was considered or passed upon there (R. 53-55). The Commissioner raised such issues for the first time in his main brief, pp. 41-47, in the Court of Appeals (see n. 2, p. 7, *supra*). Accordingly, no such issue should have been considered by the Court of Appeals.

Waiver, estoppel and collateral attack are defenses properly to be pleaded affirmatively. Cf. Rule 8(c) of the Federal Rules of Civil Procedure; *National Nickel Co.* v. *Nevada Nickel Syndicate,* 112 Fed. 44 (C.A. 9, 1901), cert. denied 184 U.S. 700 (1902); *Hollister* v. *Commissioner,* 44 B.T.A. 851 (1941); *Collins* v. *Commissioner,* 18 T.C. 99 (1952), aff'd 203 F. (2d) 565 (1954); *Carnegie Center Co.* v. *Commissioner,* 22 T.C. 1189 (1954). This is necessarily so if, as Tax Court Rule 14 requires, "The answer shall be so drawn as fully and completely to advise the petitioner and the Court of the nature of the defense". The Rule of the Tax Court is clear. So are *General Utilities & Operating Co.* v. *Helvering,* 296 U.S. 200 (1935), and *Helvering* v. *Salvage,* 297 U.S. 106 (1936).

In the *General Utilities* case, *supra,* this Court, in reversing a reversal of the Board of Tax Appeals, said, 296 U.S. at 206:

> The second ground * * * although sustained by the court, was not presented to or ruled upon by the Board. The petition for review relied wholly upon the first point; and, in the circumstances, we

> think the court should have considered no other. Always a taxpayer is entitled to know with fair certainty the basis of the claim against him.

In *Helvering* v. *Salvage, supra,* the Commissioner first asserted estoppel in the Court of Appeals upon review of a decision of the Board of Tax Appeals. The Court of Appeals held that the facts did not support the claim of estoppel, and this Court granted certiorari on the Commissioner's petition. In affirming, this Court said, 297 U.S. at 109:

> We find no reason to disagree with the judgment of the court.
>
> The defense of estoppel was not before the Board. Under what we regard as the correct practice * * * the court should have passed the point. * * *

In this case, as in those cited, the Commissioner's answer to the taxpayer's petition to the Tax Court was merely a general denial and the affirmative defense was first urged in the Court of Appeals without its having been pleaded or otherwise raised in, or passed upon by the Tax Court. Accordingly, even assuming for the purpose of the argument that the taxpayer had a remedy by way of mandamus against the Board, the Commissioner's assertion of waiver, estoppel and collateral attack came too late, and the Court below "should have passed the point". It is therefore submitted that the case must be considered, as the Tax Court did, on the merits of the controversy, and without reference to the synthetic issue which the Commissioner first raised in the Court of Appeals.

POINT III

SECTION 124 OF THE INTERNAL REVENUE CODE DID NOT EMPOWER THE CERTIFYING AGENCY TO LIMIT A CERTIFICATE OF NECESSITY THEREUNDER SO AS TO EXCLUDE FROM THE COMPUTATION OF THE ADJUSTED BASIS OF THE EMERGENCY FACILITY IN RESPECT OF THE ACQUISITION, ETC., OF WHICH THE CERTIFICATE WAS ISSUED THE EXCESS OF THE WAR-TIME COST OF SUCH FACILITY OVER ITS ESTIMATED PEACE-TIME COST, AND THE COMMISSIONER SHOULD NOT HAVE GIVEN EFFECT TO SUCH LIMITATION.

A. The authority to adopt regulations for the administration of a statute does not extend to the adoption of a regulation which denies a right created by the statute, and a regulation which would do so is void as being in conflict with the statute.

Section 124(f), as enacted, designated the Secretary of War and the Secretary of the Navy as the certifying agencies thereunder. This they continued to be from the date of enactment of the Second Revenue Act of 1940, which added section 124 to the Internal Revenue Code, until December 17, 1943, when the President, by Executive Order 9406, 8 F.R. 16955, transferred that function, as to all future applications for certificates of necessity, to the Board. Almost immediately, the Board promulgated a new policy, to quote from the Commissioner's main brief below (p. 18), that

> only facilities having no post-war use would thereafter be given 100% certificates. All other facilities would be certified only to the extent of the war-induced cost. Subject to variation in special cases, it was determined that in the normal situation the part of the cost due to abnormal war-time prices was 35%. Accordingly, in the present case, the taxpayer was given three certificates for 35% and one for 50%.

This "policy" appears to have been first set out in writing in a Board memorandum dated February

9, 1944, for circulation both within the Board and among other Government agencies (R. 45-47). In pertinent part it reads (R. 45-47):

* * * *

No facility will be certified unless the war effort would actually be weakened by the lack thereof. * * * The facility cannot be merely desirable, helpful or appropriate. It must be essential * * *.

In determining whether it is to the advantage of the Government that the facilities be privately financed, consideration must be given to the probable marketability or useful value of the facility after the war. It is recognized that there is no way by which post-war value can be definitely determined at this time. Any facility which will not have a reasonably wide market may be assumed to have relatively little post-war sales value, and therefore, it would be to the best interest of the Government that it be privately financed. On the other hand, if a facility appears to be of such a type that it would have a reasonably wide market after the war it may generally be assumed that, provided the DPC or other Government agency is willing to purchase it, it would be to the advantage of the Government that it be publicly rather than privately financed with a 100 percent certificate. It may still be advantageous to the Government to have private financing under a certificate if a percentage certificate were issued, such percentage being based, for example, on excess cost attributable to the war.

* * *

Reports must contain an expression of opinion whether it is to the advantage of the Government that the facilities be privately financed * * *. A favorable recommendation must contain a statement that * * * the facilities * * * are so essential to the progress of the war that the reporting agency recommends issuance of a certificate.

Reports must contain a statement of the percentage of cost recommended for certification.

This was followed on March 8, 1944, by a Board circular entitled "Criteria for Preparation of Recommendations for Necessity Certificates * * *" (R. 47-52), reading in part (R. 50):

.02 In the event that amortization should be allowed, determination as to whether it should be 100% or partial should be made as follows:

1. One hundred percent certificate will be given only when facilities to be amortized are wholly designed to manufacture end product exclusively for war purposes or for essential civilian use, and it is not reasonable to assume that they may be useful after the war.

2. Partial certificate representing excess construction or acquisition costs over pre-war costs * will be given when facilities to be amortized are wholly designed to manufacture end product exclusively for war purposes or for essential civilian use and it is reasonable to assume that they may be useful after the war.

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* It is impossible to predict whether post-war costs will be above or below present costs, yet it appears equitable to relate them to pre-war costs. Accordingly, pre-war costs are to be used in determining this partial certificate, and as a general rule pre-war costs are to be considered as being those in effect during the years 1937-1939 inclusive.

Partial certification in accordance with the foregoing was standardized at 35% of war-time costs, but the percentage might be increased in cases where there was definite evidence that 35% would not cover the increase in war-time costs over pre-war costs (R. 16).

Thus, the Board established as its criterion for determining whether a facility was "necessary in the

interest of national defense", that the war effort would actually be weakened by its lack, i.e. its essentiality, as contrasted with its mere desirability, helpfulness or appropriateness to the war effort. Only facilities meeting this test were to be certified. But the Board went a step further: Even if a facility met the requirements for certification, and was in fact certified, the certification would be limited to only a percentage of its cost, conceived to represent the excess of its war-time cost over its estimated pre-war cost, where it was believed that the facility would have post-war use. The express objective was to limit the amount that could be amortized under section 124 (R. 15, 16).

But, if, as we shall contend, the authority of the certifying agency under section 124 extended no further than to determine whether a facility was "necessary in the interest of national defense" (and to issue or refuse to issue its certificate to that effect), and the amortizable amount was predetermined by section 124 itself, as a statutory consequence of certification, as that part of the cost of the certified facility which was attributable to its construction or acquisition after December 31, 1939, it follows that, insofar as they purported to limit the amount to be amortized, the foregoing statements of policy, in application having the effect of a regulation, and any limitations inserted in certificates in accordance therewith, were void as being beyond the authority of the Board. *Bingham's Trust* v. *Commissioner,* 325 U.S. 365 (1945); *Addison* v. *Holly Hill Fruit Products,* 322 U.S. 607 (1944); *Helvering* v. *Sabine Transportation Company,* 318 U.S. 306 (1943); *Helvering* v. *Janney,* 311 U.S. 189 (1940); *Koshland* v. *Helvering,* 298 U.S. 441 (1936); *Manhattan General Equipment*

Company v. *Commissioner*, 297 U.S. 129 (1936); *Miller* v. *United States*, 294 U.S. 435 (1935).

This is not a case where an administrative agency, in issuing a license within its discretion, has attached a condition claimed to be beyond its authority, and the licensee seeks to retain the benefits of the license while asking the courts to relieve him of the burdens of the condition. Cf. *Federal Power Commission* v. *Idaho Power Co.*, 344 U.S. 17 (1952). Rather, it is a case where an administrative agency and the Commissioner have denied a taxpayer a right to which by statute the taxpayer is entitled on the basis of facts found by the administrative agency. In such a case the right is enforceable notwithstanding such denial. *Dismuke* v. *United States*, 297 U.S. 167 (1936); *Medbury* v. *United States*, 173 U.S. 492. For, as this Court said in *Dismuke* v. *United States*, *supra*, 297 U.S. at 172:

> * * * the power of the administrative officer will not, in the absence of a plain command, be deemed to extend to the denial of a right which the statute creates, and to which the claimant, upon facts found or admitted by the administrative officer, is entitled.

As the Court of Claims said in the *Wickes* case, *supra*, 108 F. Supp. 616 at 619:

> * * * the Board's only function was to determine whether or not facilities answered the description of the statute, i.e., were they "necessary in the interest of national defense during the emergency period." Having so determined, any attempt by the Board to reduce the benefits which Congress granted to the person whose facilities answered the description, was in violation of the statute. * * *

Accordingly, if the Board was without authority to limit the effect of certificates of necessity issued by it upon making the finding prescribed by section 124, neither the Commissioner nor the taxpayer is bound by such limitation, and their full statutory effect must be given to the certificates.

B. The plain language of section 124 granted the certifying agency no power to limit the statutory consequences of certificates of necessity. The legislative history is clear that the Congress intended to give the certifying agency no such power.

Section 23(t) of the Internal Revenue Code allows a taxpayer in computing taxable income to take "the deduction for amortization provided in section 124". Section 124, in turn, opens with the following language:

> (a) *General Rule.* Every person, at his election, shall be entitled to a deduction with respect to the amortization of the adjusted basis (for determining gain) of any emergency facility (as defined in subsection (e)), based on a period of sixty months. Such amortization deduction shall be an amount, with respect to each month of such period within the taxable year, equal to the adjusted basis of the facility at the end of such month divided by the number of months (including the month for which the deduction is computed) remaining in the period. * * *

Thus, the amount to be amortized in respect of an "emergency facility", is its "adjusted basis (for determining gain)", which in this case, as in most, is its cost.

Subsection (e)(1) defines an "emergency facility" as follows:

(1) *Emergency Facility.*—As used in this section, the term "emergency facility" means any facility, land, building, machinery, or equipment, or part thereof, the construction, reconstruction, erection, installation, or acquisition of which was completed after December 31, 1939, and with respect to which a certificate under subsection (f) has been made. * * *

This definition involves three elements: First, "any facility, land, building, machinery, or equipment"; in this case, there were buildings, machinery, and equipment (R. 5, 6). Second, "the construction * * * or acquisition of which was completed after December 31, 1939"; in this case, all construction and acquisition occurred in 1944 (R. 6, 7). Third, "and with respect to which a certificate under subsection (f) has been made"; in this case, such certificates were made (R. 5, 6).

Thus, the requirements of subsections (a) and (e) (1) were fully met, so that the statutory scheme would result, as subsection (a) provides, in the taxpayer being entitled, at its election, to deductions which would amortize the full cost of the facilities over the prescribed period. Subsection (f)(1), however, imposes a limitation on how much of the "adjusted basis (for determining gain)", i.e., how much of the total cost, may be amortized. The meaning of this subsection is the crux of the case. At all material times subsection (f)(1) read as follows:

(f) *Determination of Adjusted Basis of Emergency Facility.*—In determining, for the purposes of subsection (a) or subsection (h), the adjusted basis of an emergency facility—

(1) There shall be included only so much of the amount otherwise constituting such adjust-

> ed basis as is properly attributable to such construction, reconstruction, erection, installation or acquisition after December 31, 1939, as either the Secretary of War or the Secretary of the Navy has certified as necessary in the interest of national defense during the emergency period, which certification shall be under such regulations as may be prescribed from time to time by the Secretary of War and the Secretary of the Navy, with the approval of the President.

On analysis, the meaning of the foregoing is clear. It directs that for amortization purposes there be included in the adjusted basis—only so much of what would otherwise constitute the adjusted basis "as is properly attributable to" a certain factor. That factor is: "*such* construction * * * or acquisition after December 31, 1939, as * * * the Secretary * * * has certified as necessary"—such construction as the Secretary has certified; the factor is NOT: *so much of the cost of* such construction as the Secretary has certified, as the Commissioner contended below. Only if these italicized words are read into subsection (f)(1) can it be so construed as to authorize the certifying agency to certify costs, or portions thereof, rather than the construction or acquisition, etc., of facilities.

Subsection (f)(1) thus laid upon the certifying agency the function of determining the necessity, in the interest of national defense, for the "construction * * * or the acquisition", etc., of facilities, but it laid upon the Commissioner the function of determining when the acquisition, etc., occurred. The Commissioner could allow as amortization deductions only so much of the "adjusted basis" as resulted from the construction or acquisition, etc., of emergency facil-

ities taking place after December 31, 1939. To the extent that any part of the "adjusted basis" resulted from earlier construction or acquisition, etc., it was not to be allowed by the Commissioner for amortization purposes.

In this connection, it should be noted that in the definition of "emergency facility" contained in subsection (e)(1) the reference is to construction or acquisition, etc., "*completed* after December 31, 1939", whereas the reference in subsection (f)(1) is to construction or acquisition, etc., after December 31, 1939. The distinction is an obvious one. The construction or acquisition, etc., of a facility might continue over a period of time, and if the construction or acquisition, etc., was completed after December 31, 1939, the facility might qualify as an "emergency facility". On the other hand, its "adjusted basis", i.e., its cost, could be amortized only to the extent that it was attributable to construction or acquisition, etc., which took place after December 31, 1939, and which had been certified as necessary in the interest of national defense.

That this was what Congress intended by the language of subsection (f)(1) is clear from what the House Ways and Means Committee said in reporting the bill (H. Rept. 2894, 76th Cong., 3d Sess. (1940), p. 38):

> * * * Section 124 provides that a corporation shall be allowed a deduction for income and excess-profits tax purposes for the amortization of certain facilities which * * * either the Secretary of War or the Secretary of the Navy certify as necessary in the interest of national defense during the present emergency. Such facilities are

> land, buildings, machinery and equipment or parts thereof acquired after July 10, 1940, or the construction, reconstruction, erection, or installation of which was completed after July 10, 1940. * * * *Although a facility may be an emergency facility even though its construction was begun on or before July* 10, 1940, *only so much of its adjusted basis as is attributable to certified construction taking place after July* 10, 1940, *is subject to amortization. The remainder of the adjusted basis is subject to depreciation.* * * * (Emphasis supplied.)

That the purpose of the language in question was simply to provide for the situation where the "construction * * * or acquisition" of the facility began before the critical date, but was completed thereafter is at once apparent from a comparison of the foregoing with the recommendation of the Subcommittee on Internal Revenue of the House Committee on Ways and Means, with respect to the adoption of an amortization program, dated August 8, 1940, which was the origin of section 124.[6] Thus, the subcommittee's recommendation was:[7]

> Your subcommittee * * * recommends that a corporation be allowed a deduction for income- and excess-profits tax purposes for the amortization of certain facilities which are certified by the Advisory Commission to the Council of National Defense and either the Secretary of War or

[6] See H. Rept. 2894, 76th Cong., 3d Sess., p. 2.

[7] Joint Hearings before the Committee on Ways and Means, House of Representatives, and the Committee on Finance, U.S. Senate, on Excess Profits Taxation, Amortization, and Suspension of Vinson-Trammell Act, 76th Cong., 3d Sess., p. 3. This volume is sometimes hereinafter referred to as "Joint Hearings".

> the Secretary of the Navy as necessary in the interest of national defense during the present emergency. Such facilities are land, buildings, machinery, and equipment, or parts thereof, constructed, reconstructed, erected, installed or acquired after July 10, 1940, and the construction, reconstruction, erection, installation, or acquisition of which was contracted for prior to the termination of the present emergency. It is recommended that the write-off of the cost (adjusted basis for income-tax purposes) of such facilities be permitted to be spread over a period of 60 months, this deduction to be in lieu of the present deduction for exhaustion, wear and tear, and obsolescence provided for in section 23 (l) of the Internal Revenue Code. * * * [8]

The subcommittee's recommendation left unanswered an obvious question: What was to be the status for the purposes of amortization of a facility whose acquisition or construction was begun before the critical date but completed thereafter? Thus, during the course of the hearings on the subcommittee's recom-

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[8] July 10, 1940, was selected as the critical date because on that date the President announced that an amortization provision would be included in the excess profits bill, soon to be introduced. Joint Hearings, n. 7, *supra*, p. 31. At the joint hearings on the subcommittee's recommendations some feeling was expressed that the critical date should be an earlier one. See, *e.g.*, testimony of Under Secretary of the Navy Compton, *id.*, pp. 30-36; of K. T. Norris, *id.*, pp. 203-205; of Prew Savoy, *id.*, pp. 385-386. The bill, as introduced and passed in the House (H.R. 10413, 76th Cong., 3d Sess.) continued the July 10, 1940 date. The Senate, however, substituted January 1, 1940. S. Rept. 2114, 76th Cong., 3d Sess., pp. 8, 21. The Conference Report, S. Rept. 2114, Pt. 2 (76th Cong., 3d Sess.), p. 27, recommended a compromise on June 10, 1940, and the bill was so enacted. By section 155 of the Revenue Act of 1942, the critical date was changed to December 31, 1939, as set out in the text, pp. 31, 32, *supra*.

mendations, R. V. Fletcher, vice president and general counsel of the Association of American Railroads, testified:[9]

> I want to say, however, that this date of July 10, 1940, challenges attention. I have the impression that other witnesses have explained to the committee the importance of careful consideration with respect to that date of July 10, 1940, *so as not to exclude equipment which may have been ordered, or the construction of which may have been begun before that date.* * * * [*O*]*ur contention is that the statute should not be so written as to exclude railroad equipment which may have been contracted for prior to that date, provided it is completed subsequent thereto, provided, of course, the railroad company shall furnish the certificate which the statute no doubt will require.* (Emphasis supplied.)

According to the House Ways and Means Committee Report with respect to the bill:[10]

> The matters included in the bill were referred by your committee to its Subcommittee on Internal Revenue Taxation * * *. On August 8 the subcommittee * * * submitted its recommendations, which formed the basis for full public hearings, held jointly by your committee and the Committee on Finance of the Senate. *The recommendations of the subcommittee* * * * *modified with a view to the relief of certain types of cases disclosed in the hearings, are embodied in the bill.* (Emphasis supplied.)

Quite clearly, the definition of subsection (e)(1) as including facilities whose construction or acquisi-

[9] Joint Hearings, n. 7, *supra*, p. 352.

[10] *Loc. cit. supra*, n. 6.

tion was "completed" after the critical date, and the "so much" clause of subsection (f)(1), referring to "construction * * * or acquisition" after the critical date, were tailored to meet Mr. Fletcher's point, made in the light of the subcommittee's recommendation, that the statute should be so drafted as not to exclude facilities whose construction or acquisition was begun before, but completed after the critical date. The "so much" clause of subsection (f)(1) has no other significance. Certainly it affords no basis for contending, as the Commissioner did below, and as the Government did in the *Wickes, Ohio Power* and *Allen-Bradley* cases, *supra,* that the certifying agency or the Commissioner was authorized to limit the amount to be amortized, to a percentage of the post-critical-date cost of the facility, conceived to represent the excess of war-time costs over pre-war costs where post-war utility might be expected. Neither the language itself nor its origin permits of any such construction. Moreover, the legislative history of section 124 leaves no room for doubt that Congress was perfectly aware of the fact that emergency facilities might have post-war use, and that the amortization provisions of the bill which later became section 124, were so drafted as to preclude post-war utility being taken into account.

Thus, during the course of his testimony before the Senate Finance Committee in support of the bill, Assistant Secretary of the Treasury Sullivan was asked by Senator Vandenberg why the proposed section 124 was needed, in view of the Commissioner's existing authority under section 23(l) of the Internal Revenue Code to allow reasonable depreciation allowances, and suggested that the emergency period might

be considered as the "expected useful life" of a new war facility. The following ensued: [11]

> MR. SULLIVAN. We don't know that that is the expected useful life. There are certain facilities that are being constructed for purely national-defense projects, which may be just as useful after * * * the present emergency is over * * *. * * * Now, under the * * * bill as it comes before you, in order for a manufacturer to secure this special amortization * * * either the Secretary of War or the Secretary of the Navy must * * * certify that this new facility is necessary to national defense.
>
> SENATOR VANDENBERG. Well, then, this new statute is a limitation upon the power you already have?
>
> MR. SULLIVAN. I think not, sir.
>
> SENATOR GEORGE. Just a minute, Mr. Sullivan. You say it is necessary for them to certify that it is necessary to national defense. Do they stop there?
>
> MR. SULLIVAN. I beg your pardon.
>
> SENATOR GEORGE. Is the certificate that is issued on the recommendation of * * * the Secretary of War or Navy, as the case may be, limited to mere certification that the particular facility is necessary for defense, or *do they go further and specify what the depreciation and obsolescence amounts to?*
>
> MR. SULLIVAN. *No; they do not.*
>
> SENATOR GEORGE. *They turn that back to the Treasury?*
>
> MR. SULLIVAN. *No, sir; under the bill automatically the amortization to which they are entitled is 20 percent a year, for 5 years.*
>
> SENATOR GEORGE. Oh, yes; so you are relieved of any responsibility. * * * (Emphasis supplied.)

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[11] Hearings before the Committee on Finance, U.S. Senate, on H.R. 10413, 76th Cong., 3d Sess., pp. 124, 125. This volume is sometimes hereinafter referred to as "Hearings".

Mr. Sullivan was the spokesman for the Treasury, which had worked with the Internal Revenue Taxation subcommittee of the House Ways and Means Committee in the preparation of its recommendations,[12] and subsequently with the Committee's staff in the preparation of the bill.[13] His testimony continued:[14]

> SENATOR GEORGE. * * * You want Congress, then, to say that it is going to be all obsolete * * * in 5 years, but you are not willing to take that responsibility?
>
> MR. SULLIVAN. I don't want Congress to say that at all.
>
> SENATOR GEORGE. That is what you are doing.
>
> MR. SULLIVAN. I beg your pardon, sir. This bill says that in view of the present emergency and our necessity of speeding up these orders, and to encourage them, they must confer this special privilege which cannot be granted under the present law.
>
> SENATOR GEORGE. I take issue with you on it, but that is probably a moot question if you are going to put it in the law that they should be allowed 20 percent. But if it is reasonable to allow depreciation of 20 percent per year on a facility constructed to meet this national emergency, and if it is reasonable to make an allowance for obsolescence, the Treasury has the authority to do it.
>
> MR. SULLIVAN. That is correct, but I think we are using "reasonable" in two different ways, Senator George. * * * Under this law, it may be prudent, it may be the wise thing to do; but I couldn't say to this committee that it is reason-

[12] Joint Hearings, n. 7, *supra*, p. 2.

[13] Hearings, n. 11, *supra*, p. 117.

[14] Hearings, n. 11, *supra*, p. 125.

able to expect that an ultra-modern factory that is to be constructed in the latter part of 1940 or the first part of 1941, built with all of the latest skill and engineering experience, is going to be absolutely useless in 1946. I don't think that is "reasonable," and yet I believe it is desirable and prudent to grant this amortization to those companies that are putting up new facilities for this picture.

SENATOR GEORGE. It may not be reasonable under the amortization section in this bill to reach that conclusion. *It may be that that facility will have a use after the passing of the emergency. That is true. But we are saying here in the law that nevertheless it should be written off.* * * * (Emphasis supplied.)

Senator George pursued the matter further:[15]

SENATOR GEORGE. * * * Now, you are satisfied that the statute is all right and Congress is going to rely on your judgment about it?

MR. SULLIVAN. Yes, sir; we are satisfied that the statute is right.

SENATOR GEORGE. We take it to be your judgment on that question that these added facilities are going to become either what we now call for lack of better term, in "obsolescence" or that the depreciation is going to absorb all the value within the statutory period that follows the issuance of this certificate.

MR. SULLIVAN. Excuse me, Senator George, that is not our judgment. We don't know that they are. We are saying that regardless of whether or not they do, it is prudent and wise to confer this special privilege of assuming that they are going to——

SENATOR GEORGE (interposing). But we are writing it in the law?

MR. SULLIVAN. That is right.

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[15] Hearings, n. 11, *supra*, p. 127.

William S. Knudsen, then a member of the Advisory Commission to the Council of National Defense,[16] testified in similar vein. He said:[17]

> If, at the end of the emergency, it turns out that plant facilities are useful for productive purposes during the emergency period only, the taxpayer is being only fairly dealt with by allowing him to charge off his plant against taxable income during the emergency period. If, however, the plant has productive use after the emergency period is terminated, there is no over-all advantage to the taxpayer in the rapid amortization because during the period after the emergency it will no longer be able to deduct depreciation or amortization on the plant, it having already been completely written off for tax purposes.

In reporting the bill, the House Ways and Means Committee thus summarized section 124 (H. Rept. 2894, 76th Cong., 3d Sess., p. 16):

> Under the bill * * * a corporation is allowed a deduction for income- and excess-profits tax purposes for the amortization of * * * facilities which are certified by * * * either the Secretary of War or the Secretary of the Navy as necessary in the interest of national defense * * *. *The write-off of the cost (adjusted basis for income tax purposes) of such facilities is permitted to be spread over a period of* 60 *months* * * *. (Emphasis supplied).

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[16] The Council of National Defense also worked on the preparation of the bill. Joint Hearings, n. 7, *supra*, p. 2. It was named in the bill as a necessary joint certifying agent with either the Secretary of War or the Secretary of the Navy, and the bill was so passed. By joint resolution of October 30, 1941, c. 464, 55 Stat. 757, subsection (f)(1) of section 124 was amended so as to eliminate the Council's function in this regard.

[17] Hearings, n. 11, *supra*, p. 159.

There is no suggestion whatsoever in the report, which deals with the provisions of section 124 in detail (see pp. 16, 17, 38-41), that the certifying agencies were being given any authority to limit the amortizable amount to less than the cost of a certified facility. If such power were being given to the certifying agencies, that feature would surely have merited comment.

When the bill was being debated on the floor of the House, Representative Boehne of Indiana, a member of the Ways and Means Committee and of its Subcommittee on Internal Revenue Taxation, made the following statement (Cong. Rec., Aug. 29, 1940, p. 11240):

> Now just what do these amortization provisions do? First, they fix the useful life of facilities certified to be necessary in the national defense as 5 years. They remove all problems of proof.
>
> Second, there is no bounty, bonus, or windfall involved. Introducing certainty into the present provision is a desirable improvement. It is designed to give the manufacturer, who is asked to furnish needed new facilities, only a fair break.
>
> Finally, the effect of the clearing-up process is to give a straight-line basis—20 percent a year—* * *.
>
> * * *
>
> In the present national emergency, business is asking no favor of the Government when it merely desires the certainty that private capital expended to construct, or used to acquire, a needed new facility, certified to be necessary for the national defense, may under this law be amortized over a five-year useful life, which is what business is being told is the present program. If the emergency lasts longer * * * no further deductions * * * will be allowed. The proposed amortization provisions will do no more than is fair and just. It will certainly aid national defense.

It is accordingly quite apparent that the legislative history of section 124 confirms that the "so much" clause of subsection (f)(1) has no meaning or purpose other than to permit the amortization of post-critical-date costs of a certified facility whose construction or acquisition was begun before, but completed after, the critical date, and that it was not intended that the certifying agency or the Commissioner should have any authority under section 124 to limit the amortizable amount of the cost of a certified facility because it had or was likely to have post-war use. The legislative history permits of no interpretation of section 124(f)(1) other than that the sole function of the certifying agency was to certify (or refuse to certify) that the "construction * * * or acquisition" of a facility was "necessary in the interest of national defense". This is the plain meaning of section 124, and to read it otherwise requires not only that the legislative history be overlooked, but that the statutory language be distorted. In his persuasive dissent in *United States Graphite Co.* v. *Sawyer*, 176 F. (2d) 868, 870, Judge Miller of the Court of Appeals for the District of Columbia made a most painstaking and compelling analysis of the statutory language, as follows:

> In order to reach the extraordinary conclusion that subsection (f)(1) authorizes the certification as necessary to national defense of less than 100 percent of the cost of a facility otherwise "emergency" in character, the appellee is forced to read subsection (f)(1) as though it provided:
>
> > "There shall be included in amortizable cost only so much of the cost of the facility as * * * the Secretary * * * has certified as necessary in the interest of national defense * * *."

Such reading omits important words in the subsection. It overlooks completely the fact that its language includes the following:

> "* * * as is properly attributable to such construction * * * after December 31, 1939, as * * * the Secretary * * * has certified as necessary in the interest of national defense * * *."

The appellee's construction of subsection (f)(1) as meaning "only so much of the cost as has been certified as necessary in the interest of national defense" does plain violence to the grammatical structure of the statutory sentence, for, as has been said, it leaves out important words. Careful reading of the poorly worded subsection reveals its meaning as

There shall be included as amortizable cost only so much of the cost of the facility as is properly attributable to the part of it which was constructed after December 31, 1939, and which has been certified as necessary in the interest of national defense.

We have seen that subsection (e), in defining the term "emergency facility", expressly excluded anything constructed or acquired before December 31, 1939. That critical date of subsection (e) was carried on into subsection (f)(1), which undertook to govern a situation involving a facility, a part of which was constructed before December 31, 1939, and so could not be amortized, and the other part of which was constructed after that date and so could be certified for amortization. * * * I think subsection (f)(1) clearly means there can be amortized only the "adjusted basis" (which in this case means cost) of that physical portion of a facility which is "emergency" in character in that (a) it had been constructed after December 31, 1939, and (b) it had been properly certified as necessary in the interest of national defense.

The construction now contended for by the Commissioner and the Government would require section 124 to be read as though costs, rather than facilities, were to be certified as necessary in the interest of national defense. But, in a joint notice of procedure to be followed under section 124 issued by the Treasury and the certifying agencies on November 1, 1940, less than a month after its enactment, the term "necessity certificate" was defined as meaning (1940-2 Cum. Bull. 133, 135):

> * * * a certification, issued pursuant to section 124(f) of the Internal Revenue Code, *that the construction or acquisition of the facilities, referred to in the certificate, is necessary in the interest of national defense* during the emergency period. (Emphasis supplied.)

The identical definition is contained in the superseding notice of procedure issued jointly by the Treasury and the certifying agencies (1941-2 Cum. Bull. 134, 135) a year later.

Similarly, in his report to the Secretary of War on the War Department's administration of section 124, Under Secretary Patterson made it clear (R. 25, 26) that certificates of necessity were issued with respect to facilities and not costs, for he thus described the effect of that section:

> Necessity Certificate. For facilities acquired or constructed after June 10, 1940, which the * * * Secretary of War * * * by the issuance of a "Necessity Certificate" certified were necessary in the interest of national defense, an annual deduction of 20 percent of the cost could be taken at the election of the taxpayer. Thus, these facilities could be amortized in five years.

It is significant, moreover, that nowhere in his comprehensive report did Under Secretary Patterson refer to the issuance of certificates calculated to limit the amortizable amount on account of the post-war utility of the certified facility. While the report does refer to partial certification, it does so only in connection with the certification of facilities of a size or capacity greater than was necessary in the interest of national defense, or where the facilities certified were to be used only partially for defense production (R. 34-38). The references to partial certification contained in the Treasury Regulations originally adopted under section 124 (1940-2 Cum. Bull. 120, 130) and in subsequent amendments thereof (1942-2 Cum. Bull. 126, 132; App., pp. 3a-4a, *infra*) clearly relate to partial certification on such basis. Nor do the Treasury Regulations as originally adopted and subsequently amended leave any room for doubt that the Commissioner understood that under section 124 it was the construction or acquisition of facilities, and not the amortizable costs thereof, that the certifying agencies were to certify, for again and again the Regulations refer to the certification of "construction, reconstruction, erection, installation or acquisition" of facilities, but not once do they refer to the certification of the amount of amortizable costs. (See 1940-2 Cum. Bull., 120, 130; 1942-2 Cum. Bull. 126, 132; App., pp. 3a-4a, *infra*.)

It is therefore submitted that section 124 predetermined the amount amortizable with respect to a facility certified as necessary in the interest of national defense, as the cost of construction or acquisition after the critical date; and that neither the certifying agencies nor the Commissioner were empowered under section 124 to reduce the amount to be amortized

on the ground that the certified facility would have post-war use. Accordingly, we submit that the regulations of the Board purporting to limit the amount to be amortized, in the case of a facility having post-war use, to the excess of its war-time cost over pre-war cost, and any restriction inserted in a certificate pursuant thereto, are void as beyond the power of the Board. It follows that amortization of the full statutory amount must be allowed by the Commissioner.

In the light of the manifestly clear purpose and intent on the part of the Congress to predetermine by statute the amount amortizable with respect to a certified facility, the question arises as to how and why the contrary can be urged. To be sure, the language of section 124(f)(1) is in part responsible. See *United States Graphite Company* v. *Sawyer*, 176 F. (2d) 868, 870 (dissenting opinion of Miller, *J.*). But this is not the whole answer. The answer would appear to rest in an attempt to equate post-war hindsight with pre-war foresight.

Employing hindsight, one can be impressed by the circumstance that when the Board adopted its limited amortization policy early in 1944, after the United States had long been at war, industry in large part apparently accepted the policy,[18] or at least made

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[18] The use of "apparently" is advertent. According to Sidney T. Thomas, former Chief, Tax Amortization Section, War Production Board, industry "resented • • • boisterously" the Board's new policy, and a "dog fight" ensued for "2 or 3 months", although facility expansion continued. Hearings, Special Senate Committee Investigating the National Defense Program, 80th Cong., 1st Sess., Part 42, pp. 25554, 25555. Prior to Pearl Harbor, "Manufacturers remained cautious • • •. Neither industry nor

no loud public outcry. One can also be impressed by the circumstance that many emergency facilities turned out to be useful and valuable in the post-war period. The difficulty, however, is that neither the Congress nor industry knew, in the summer and fall of 1940, when section 124 was under consideration and was enacted, what the future held. The purpose and intent of Congress in enacting section 124 must be determined in the light of the foresight that the Congress and industry exercised in 1940, and not in the light of hindsight, which makes all men equally wise.

In enacting section 124 in the fall of 1940, the Congress quite definitely had no intention of providing any bonanza to American industry at the expense of taxpayers generally, for by the very same Second Revenue Act of 1940, which made section 124 part of the Internal Revenue Code, the Congress enacted a heavy excess profits tax. The crucial problem before the Congress was that, following the German "blitzkrieg" conquests of Norway, Denmark, the Netherlands, Belgium and France in the spring of 1940, the defense needs of the nation were so enormous and industry was still so depression-minded that few, if any, were ready to predict that the new facilities which were needed for the defense program would be useful, in the economic sense, once the crisis was over. Certainly, as we have seen, the Treasury was unwilling to commit itself to a prediction.

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government was ready for a thoroughgoing conversion from peace to war * * *." However, "After Pearl Harbor there was never any doubt about the determination of the whole country to produce for war as it had never produced for peace * * *." Stimson and Bundy, *On Active Service in Peace and War* (1948), pp. 380, 381, 491.

A leading spokesman for the executive branch in the development of the World War II amortization program was Secretary of War Henry L. Stimson. At the joint hearings of the House Ways and Means Committee and the Senate Finance Committee on the twin problems of amortization and excess profits taxation, the Secretary stated in broad terms the problem which the executive and legislative branches of the Government then faced:

> Risks are inherent in any business enterprise. Industry may be expected to undertake normal risks. But the risk to industry of undertaking at the request of the Government to expand plant capacity at industry's own expense and of then being left, upon a sudden cessation of the emergency, with these expanded facilities useless, is one that is entitled in my opinion, to special consideration. Under those circumstances, the uncertainty of future taxation as affected by this expanded construction not only, it seems to me, fails to give the special consideration which I have just mentioned, but it rather tends to penalize the situation which the manufacturers confront. It is this element of uncertainty in respect to the industry's right quickly to amortize its investments in an expanded construction program, and also the uncertainty, or I may say the delay, as to the amount and character of taxation which will be levied during the period of the contract, which according to our observations chiefly have prevented the execution of these contracts.[19]

[19] Joint Hearings, n. 7, *supra*, p. 23. Obviously, by "useless" the Secretary meant because of excess capacity, not because of special characteristics which only war could employ. See also testimony of William S. Knudsen, Chairman, Advisory Commission to the Council of National Defense, *id.*, p. 47; Assistant Secretary of the Treasury John L. Sullivan, *id.*, pp. 74, 75; and Assistant Secretary of the Navy Lewis Compton, *id.*, pp. 29, 30.

As stated by the House Ways and Means Committee in reporting out the bill (H. Rept. No. 2894, 76th Cong., 3d Sess., p. 16):

> The extension of existing facilities is a necessary and vital part of the national-defense program. To obtain the needed facilities will require the investment of hundreds of millions of dollars. Your committee has been informed by the Advisory Commission to the Council of National Defense that substantial amounts of private capital will not be invested in the construction of such facilities unless corporations are assured, in view of the fact that such facilities will be of use chiefly only during the period of national emergency, that they will be permitted to amortize the cost thereof over a shorter period than would be permitted under the depreciation provisions of the Internal Revenue Code.

It was in this posture of things, of private enterprise being virtually unwilling in 1940 to gamble on the post-war usefulness of this enormous productive capacity, that the Congress enacted section 124, permitting the rapid amortization of the cost of emergency facilities. To the Congress, to the Administration, and to industry, *at that time,* the five-year rapid write-off of 100% of such facilities appeared only reasonable.[20] It was

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[20] In speaking of 1940, Secretary Stimson later said (Stimson and Bundy, *supra,* n. 18, pp. 352, 353):

> The existing tax laws made no provision for the special circumstances of defense production, in which large plants must be built which would have almost no value after the emergency had ended. No businessman wanted to be saddled with such white elephants, and it was generally agreed that the law must be changed to permit contractors to write off such construction expenses within a five-year period. The administration insisted, however, that such relief must be

not only the American businessman who feared, from the outset of the emergency and throughout the war, a post-war economic collapse or a drifting back into pre-war depression. In an address in Chicago on October 28, 1944, the President (Cong. Rec., Nov. 14, 1944, pp. A 4729-4731) stressed the need for governmental action to continue, in the coming post-war era, the high level of war-time production and employment. So, too, in September 1945, the Senate Committee on Banking and Currency recognized (S. Rept. No. 583, 79th Cong., 1st Sess., p. 2) that:

> * * * within a few months there will be a critical point at which we shall face (1) the danger of boom and bust or (2) the danger of stagnation.

And even earlier, in December 1944, the War Contracts Subcommittee of the Senate Military Affairs Committee had reported (S. Subcommittee Print No. 12, 78th Cong., 2nd Sess., p. 10):

> During the war, we have transformed our economy into an economic skyscraper of breath-taking magnitude. At present, our economy is producing goods and services at the rate of $196,000,000,000 a year. This compares with a gross national product of around $99,000,000,000—or only about half the size—in 1929.
>
> Almost half of the framework supporting this giant structure consists of war contracts. When war contracts are withdrawn, the danger is that the entire edifice will topple over. * * *
>
> Unless an economic substitute is found for war contracts, mass unemployment will become a seri-

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accompanied by a stringent excess-profits tax. * * * Businessmen must be prevented from making excess profits, but they were not going to sign contracts until they had a bill protecting them against large losses * * *.

ous threat and the number of unemployed men and women in this country could easily surpass anything that was dreamed of during the last depression.

Moreover, the risk of post-war deflation was not the only imponderable. There also was the very real risk that there might be no profits out of which to amortize the cost of the installation unless management was successful in its endeavor to shift from the production of plow shares to swords; a necessity certificate was no guarantee of profits. In short, by 1940 foresight, the 100% rapid write-off provisions were not merely a generous give-away. The fortunate economic status of American industry in 1956 is real enough, we trust. But its reality is no proof of the unreality of risks envisaged and accepted in 1940. Nor is the fact that for some the risks taken may have paid off in profits—the very objective of risk-taking—any basis for concluding that there were no risks. But even if it were, even if such profits should now be regarded as mere windfall, the hindsight which sees this is no basis for frustrating the clearly evident and aptly expressed Congressional purpose.

POINT IV

IT WAS ERROR FOR THE COURT BELOW TO DISREGARD AN ESSENTIAL FINDING OF FACT MADE BY THE TAX COURT ON THE BASIS OF THE STIPULATION OF THE PARTIES, AND TO SUBSTITUTE THEREFOR ITS OWN FINDING. IN ANY EVENT, EVEN ON ITS THEORY OF THE CASE, IT WAS ERROR FOR THE COURT BELOW NOT TO REMAND.

The Court below said, 230 F. (2d) at 164 (R. 61):

> * * * It is * * * evident that the partial certificates which the Board issued represented only a determination that the facility was necessary on the assumption that 35 per cent or 50 per cent

rapid amortization would be allowed. If the percentage of cost subject to amortization was varied, the cost to the government would vary, and the determination as to necessity might not be the same.

Since the Board never determined that the facilities in question were necessary to the national defense in their entirety, it was error for the Tax Court to permit accelerated amortization of their entire cost. * * *

But, as already noted, the case was tried to the Tax Court on stipulations of facts between the parties, which the Tax Court adopted in their entirety, 23 T.C. 988, 989 (R. 3-7, 8A, 8B; and 53), and included among the stipulations was one which set forth "the reasons for the percentage limitations appearing on the face of the" certificates (R. 7; Comm'r's Br. below, p. 5, n. 3). In his main brief to the Court below, the Commissioner summarized this stipulation, and of necessity, the consequent finding of the Tax Court, as follows (pp. 4-5):

All these partial certifications were issued pursuant to the then policy of the War Production Board of * * * certifying only that portion of the cost representing excess war costs where the facility had clear post-war use. In the ordinary case this excess war cost was considered to be 35%.[21]

With this the taxpayer is in agreement, and so stated in its brief below (p. 1). And, as the Commissioner further said in his brief below (p. 18), the Board's policy was that "only facilities having no post-war use would * * * be given 100% certificates. All other facilities would be certified only to the extent of war-

[21] See n. 2, p. 7, *supra*.

induced cost. * * * Accordingly, in the present case, the taxpayer was given three certificates for 35% and one for 50%."

Indeed, as the Government said in its reply brief submitted to this Court in support of its motion for leave to file a petition for rehearing in *United States* v. *Ohio Power Co.*, No. 312, October Term, 1955 (p. 3):

> And, in *National Lead*, both the Government and the taxpayer presented the case to the Court of Appeals as one where the certificates were issued for less than 100 percent of cost *only because of the policy of the administrative agency to reflect post-war use.* (Emphasis supplied.)

In this case the parties stipulated, the Tax Court found as fact, and both parties took the position, that in each of the Board's certificates, the percentage represented not the *extent* to which the Board determined the certified facility necessary to the war effort, as the Court below presumed to find, but the *estimated excess of war cost over the estimated peace-time cost* of a facility necessary in the national defense, but having post-war utility.

In these circumstances, what warrant can there possibly be for the substitution by the Court below of its own finding of fact for that of the Tax Court? The Court of Appeals may reverse or modify findings only if they are "clearly erroneous" and not supported by the evidence (Sec. 1141(a), I.R.C. '39; Sec. 7482, I.R.C. '54; *Wellington* v. *Commissioner*, 196 F. (2d) 421 (C.A. 7, 1952); and *Wright-Bernet, Inc.* v. *Commissioner*, 172 F. (2d) 343 (C.A. 6, 1949)). But how can the Tax Court's finding in this case be held to be

"clearly erroneous"? It was error, we submit, for the Court below to disregard this finding and substitute its own.

If, notwithstanding the stipulation between the parties, the findings of the Tax Court, and the position taken by both parties before the Court below, there remained any question as to what the Board was doing when it issued the limited certificates, or if the question of the Board's authority was necessarily to be litigated in some other forum before a resolution of the instant tax controversy, then, as the taxpayer asked upon petition for rehearing, the Court below should have remanded the case to the Tax Court to afford the taxpayer an opportunity to improve the record, if it could. *Hormel* v. *Helvering*, 312 U.S. 552 (1941); *General American Tank Car Corporation* v. *El Dorado Terminal Co.*, 308 U.S. 422 (1940).

The nature of the Board's action was not in controversy before the Tax Court. It was the subject of stipulation. Any question left open by the stipulation was subject to resolution by the introduction into the record of the relevant files of the Board or by other means. Similarly, if the instant tax controversy could not be resolved absent a judgment in an action between the taxpayer and the Board, the latter's successor, the Secretary of Commerce,[22] is amenable to process, and the taxpayer should have been given an opportunity to correct the record by introducing, if it could, an appropriate judgment.

While in denying the taxpayer's petition for reargument the Court below rendered no opinion, more than

[22] Executive Order 9841, 12 F.R. 2645.

a clue to its reasons for not remanding is apparent from the opinion it did hand down. Thus, the Court below said, 230 F. (2d) 165 (R. 62):

> * * * If the petitioner [*sic*] had sought mandamus or appropriate injunctive relief in the District of Columbia and had been successful, a prompt and proper exercise of the Board's discretion would still have been possible. Instead the petitioner chose to accept the benefit of the partial certificate without claiming that it was based on an action outside the authorization of the statute. It is now impossible for any court or administrative agency or official to make a proper determination of necessity based on the considerations relevant in 1944 when the certificate was issued. In any event no one can now summon up or accurately recall the relevant conditions which existed over ten years ago. Under these circumstances the taxpayer has forfeited his right to challenge the Board's action. * * *

The Court's observations would seem to present a veritable paradox of omniscience and nescience. The certificates were issued in 1944, some twelve years ago. Many controversies have been determined longer after-the-fact than that. See, *e.g.*, *United States* v. *Bethlehem Steel Corp.*, 315 U.S. 289 (1942); *Hudson* v. *Texas Gulf Sulphur Co.*, 72 F. (2d) 251 (1934), cert. denied, 293 U.S. 617 (1934). Indeed, fifteen and twenty year statutes of limitations are not uncommon. Nor is it necessarily so that the passage of time dulls the perception of the relevant considerations. On the contrary, it may sharpen them. Thus, for example, who would deny that the tribunal that retried Joan of Arc in 1455, had a better perception of the relevant considerations than the court that tried and condemned her in 1431?

In any event, the Court below could not know whether it is "now impossible for any court or administrative agency or official to make a proper determination * * * based on considerations relevant in 1944." In fact, the considerations that were relevant in 1944 are not difficult to ascertain, and for anything that may not be spelled out in contemporary official documents, some of which are already in the record and the others of which are presumably available, there would undoubtedly be qualified witnesses to whom 1944 would not be a forgotten era. However that may be, the burden of proof would be on the taxpayer. And the taxpayer was entitled to an *opportunity* to improve the record if it could. *Hormel* v. *Helvering*, 312 U.S. 552 (1941).

The further reason of the Court below, that by its "acceptance" of the certificates, the taxpayer "forfeited" its right to litigate the question, lends credence to the thought that the view of the Court below as to the impossibility of now applying considerations that were relevant in 1944, may stem from its own failure to remember 1944.

The first certificate was issued in February, 1944. The landings at Anzio and on the Kwajalein Atoll had just been made in January. The battle for Cassino was still raging and the Abbey was bombed on the 15th. Berlin would first be bombed by American planes the next month.[23]

The second certificate was issued in June, 1944. The Germans began their "robot" bomb attacks on England during this month; on the 4th Rome fell and the

[23] Information Please Almanac, 1953 (Washington *Star* Ed.), pp. 677-679.

6th was D-Day. The landing on Guam would not take place until the next month, and the landing in Southern France and the liberation of Paris would not be accomplished until August. Okinawa was a year off.[23]

The third certificate was issued in September, 1944. This month saw the battles for Antwerp and Brussels and the landing on Palau. The Japanese surrender was still almost a year ahead.[23]

The fourth certificate was issued in November, 1944. The first landings on the Philippines had just been made the previous month, and it would not be until the following month that a landing would be made on Mindoro. The German counter-offensive and the Battle of the "Bulge" were still a month or more ahead; the landing on Iwo Jima was still three months ahead, and it would not fall for still another month.[23]

The thrust of the argument of the Court below is that the taxpayer and others to whom the Board had issued certificates of necessity limited in percentage, should have declined in the midst of the war to build or otherwise enlarge facilities necessary in the war effort, and should have engaged instead in litigation. The situation is vastly different from that presented in *Callanan Road Improvement Company* v. *United States,* 345 U.S. 507 (1953), relied on by the Court below, and more closely resembles those presented in *Union Pacific R.R. Co.* v. *Commission,* 248 U.S. 67 (1918), and *Swift, etc. Company* v. *United States,* 111 U.S. 22 (1884). The alternatives open to the taxpayer, and to those similarly situated, were to proceed

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[23] Information Please Almanac, 1953 (Washington *Star* Ed.), pp. 677-679.

with the facilities necessary to production for the war effort, or to engage in a veritable industrial sit-down, with all of the consequences that that might have entailed in view of the Government's war powers. See, *e.g.*, Act of Oct. 16, 1941, c. 445, 55 Stat. 742, as amended by the Act of March 27, 1942, c. 199, Title VI, Sec. 601, 56 Stat. 181. That, under the circumstances, the result of their having taken the former course[24] should, as the Court below says, be the forfeiture of their right to litigate the question at all would appear to be unconscionable. Particularly would this be so since, as we have seen, mandamus would have been inconclusive and wholly inadequate as a remedy. Further, if the record and the findings of the Tax Court be bare as to facts which would make clear this Hobson's choice, the fault lies elsewhere than with the taxpayer, for no question of waiver, estoppel or collateral attack was raised by the Commissioner in the Tax Court and the case was not tried to that issue. As this Court said in reversing a reversal of a decision of the Board of Tax Appeals in *General Utilities & Operating Co.* v. *Helvering, supra,* 296 U.S. at 206:

> The second ground of objection, although sustained by the court, was not presented to or ruled upon by the Board * * *. Always a taxpayer is entitled to know with fair certainty the basis of the claim against him. Stipulations concerning facts and any other evidence properly are accommodated to issues adequately raised.

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[24] It is perhaps significant that *Graphite*, although relating to a certificate issued in 1944, did not arise until 1947, well after the war was over. Presumably, the facilities involved had been acquired by then.

It is therefore submitted that the Court of Appeals erred in substituting its own finding of fact for a finding of the Tax Court which was fully supported by the evidence, and that, in any event, on its theory of the case, the Court below erred in not remanding to the Tax Court.

POINT V

THE JUDGMENT OF THE COURT OF APPEALS SHOULD BE REVERSED AND THE ACTION OF THE TAX COURT APPROVED.

The findings of fact of the Tax Court are the facts as stipulated by the parties. 23 T.C. 988, 1002 (R. 3-8, 8A, 8B, 53). As such, they are supported by the evidence, and are conclusive. Accordingly, the only questions are questions of law. The Court below erred in disregarding the Tax Court's finding, stipulated by the parties, as to "the reasons for the percentage limitations appearing on the face of the" certificates (R. 7). If there were any possibility of doubt as to the meaning of the Tax Court's finding and the stipulation between the parties in this regard, it was utterly dispelled by the position taken in the Court below by both parties as to such "reasons". As this Court said in *General Utilities & Operating Co.* v. *Helvering*, *supra*, 296 U.S. 200 (1935), 206, 207:

> Here the court undertook to decide a question not properly raised. Also it made an inference of fact directly in conflict with the stipulation of the parties and the findings * * *. To remand the cause for further findings would be futile. The Board could not properly find anything which would assist the Commissioner's cause.
>
> The judgment of the court below must be reversed. The action of the Board of Tax Appeals is approved.

It is therefore submitted that the judgment of the Court of Appeals should be reversed, and the action of the Tax Court approved.

In the event, however, that this Court, while holding in this, or in the *Allen-Bradley* case, No. 78, this term, or in the *Ohio Power* case, No. 312, October Term, 1955, No. ——, this term, that neither the Board nor the Commissioner could lawfully limit the amount amortizable under section 124 with respect to a certified facility on the ground that it would have post-war utility, should nevertheless accept the theory of the Court below, then the case should, of course, be remanded to the Tax Court to afford the taxpayer an opportunity to improve the record.

CONCLUSION

The main issue before this Court—the scope of the statutory authority of the War Production Board—must some day be forthrightly met. To leave it in the limbo to which the Court below consigned it is to invite interminable litigation, in the courts of the District of Columbia, in the Tax Court, in the District Courts, in the Courts of Appeals, and in the Court of Claims. If it is decided that the Board had the authority claimed for it, that ends the matter. If, on the other hand, it is decided that the Board exceeded its authority, taxpayers can be dealt uniform justice only by permitting these tax controversies to be resolved as tax controversies. A holding that the Board exceeded its authority, but that its error cannot be corrected in a tax controversy, would both deny a statutory right and vitiate a statutory remedy. This

Court will not, we submit, sanction such a double frustration of the will of Congress.

Respectfully submitted,

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